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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

PHILIP PELTZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, affirming the judgment of conviction, is reported at CCH Federal Securities Law Reporter, ¶ 92,836. It is reprinted at Appendix A, pp. 1a to 13a, *infra*. The opinion of the United States District Court for the Southern District of New York, denying a motion for new trial, is not reported. It is reprinted at Appendix B, pp. 16a to 18a, *infra*.

JURISDICTION

The decision of the Court of Appeals was issued on October 19, 1970. A timely Petition for Rehearing was denied on November 18, 1970, p. 15a, *infra*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where the trial court instructs the jury, in accord with the pretrial representations of the prosecution, that the defendant is charged with participating in a conspiracy for a specific object, may the Court of Appeals affirm the resulting conviction on the theory that a different, "general conspiracy" was charged?

2. What mental state must the government prove to establish criminal liability under § 32(a) of the Securities Exchange Act of 1934, which provides that "Any person who willfully violates any provision of this title, or any rule or regulation thereunder the violation of which is made unlawful * * * under the terms of this title" shall be subject to a fine and/or imprisonment?

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States; the general conspiracy statute, 18 U.S.C. § 371; §§ 10(a), 10(b) and 32 of the Securities Exchange Act of 1934, 48 Stat. 891, 904 15 U.S.C. § 78j(a) and (b) and 78ff. It also involves SEC Regulations 10a-1(a) and 10b-5, 17 C.F.R. § 240.10a-1(a) and 17 C.F.R. § 240.10b-5. These laws are all set forth in pertinent part in Appendix C, pp. 19a-20a, *infra*.

STATEMENT OF THE CASE

Introduction

Petitioner was convicted on one count for violating 18 U.S.C. § 371 by conspiring to defraud the United States of the services of one of its employees, Murray B. Weiner. The prosecution charged, and the case went to the jury, on the theory that the object of the conspiracy was for Weiner to give Peltz confidential information regarding action by the Securities Exchange Commission ("SEC") against Georgia-Pacific Corporation. The Court of Appeals, however, affirmed on the theory that there was a "general conspiracy" (p. 5a, n. 2, *infra*) for Weiner to disclose information about Commission action to Peltz. The first question presented by the Petition is whether the Court of Appeals properly affirmed the conviction on this new theory of the objective of the conspiracy.

Petitioner was also convicted on three counts for violating § 32(a) of the Securities Exchange Act of 1934 (hereinafter "the 1934 Securities Act") by "willfully" violating regulations promulgated thereunder by the SEC. Petitioner was charged with selling shares of Georgia-Pacific without telling his brokers that he did not own those shares. The prosecution charged and the case went to the jury on the theory that Petitioner thereby engaged in a manipulative or deceptive device in violation of SEC Rule 10b-5 (p. 20a, *infra*) and caused short sales to be made in violation of SEC Rule 10a-1(a) (the "down-tick" rule) (*id.*). The second question presented by the Petition is whether the courts below applied the proper standard in determining that Petitioner's violation of those rules was "willful" within the meaning of § 32(a).

A. The Government's Evidence

The evidence which the Government presented in support of the indictment, and which we do not challenge here, can fairly be summarized as follows:

1. The Conspiracy Count.

Petitioner Peltz was an acquaintance of one Murray B. Weiner, a Branch Chief of the SEC's Corporation Finance Division. Weiner learned from Ira Pearce (a fellow employee at the SEC, whose integrity was not in question) that Pearce had recommended on or about March 11, 1966, that the SEC bring suit against Georgia-Pacific Corporation for violations of the Securities Act, and that on March 24 the Commission had approved such action. (70-74A).[1] Pearce testified that Weiner's first inquiry concerning the Georgia-Pacific matter was "about April 12, 13, 14, 15, in that period" (105A), and there were approximately five or six conversations in the following two weeks concerning the progress Pearce was making toward filing an injunction (77A). The original target date for the SEC's suit against Georgia-Pacific was April 15, but it was not actually brought until April 27 (78A). On April 7, 11, and 12 Peltz sold a total of 3,300 shares of Georgia-Pacific. On April 14, Peltz had told Norman Horwitz and his wife Sheila (who at that time had been Horwitz's fiancee) that he had a "contact" at the SEC who had previously given him information about several companies had told him that the SEC was proposing to move against Georgia-Pacific, and that Peltz had sold several thousand shares of Georgia-Pacific but was having trouble covering by buying long because the suit had been de-

[1] A number followed by "A" refers to the Appendix of Appellant in the Court of Appeals.

layed, and the expected drop in the price had not yet occurred (111A-113A). That night Peltz placed a phone call to a number identified as Weiner's residence in Maryland, after which he advised Horwitz "Everything is okay, it's going to be released in a day or two, they're working on the final papers." (116A) During the following week, Peltz telephoned Sheila several times reporting on the progress of the SEC proceeding. At one point, Peltz told her that in his law practice he had defended prostitutes, and "sometimes he would get the company of these girls for his friend in Washington." (164A) Patricia Parkhurst testified that in February 1966 Peltz had arranged for her to have sexual relations with a man who was identified at trial as being Weiner, but whom she knew as "Mel Fein." (263-264A) Some two months later, she reported to Peltz that she had received a call from "Fein." According to her, Peltz became hysterical and told her not to see "Fein" again because he was involved in something and that she should not discuss "Mr. Fein or anything" with the F.B.I. if they came to investigate (266A).

2. The Securities Act Counts.

The Government charged that Peltz had violated the 1934 Securities Act when he sold 1,000 shares of Georgia-Pacific through Bache & Company and 2,000 shares of Georgia-Pacific through Carl M. Loeb, Rhoades & Co. on April 7, 1966. In both instances Peltz told the representative that either he or his mother owned the stock and omitted to state that the sale was "short." (169A, 268-272A) The Government's theory was that because of Peltz' misstatement, the brokers did not insist that he put up the collateral necessary to comply with the applicable regulations of the Federal Reserve Board and were thereby subjected

to risk of loss if Peltz did not deliver the stock; accordingly these were "material facts" within the meaning of SEC Rule 10b-5, which prohibits fraudulent statements or omissions in connection with securities transactions. The Government also showed that the sales of 1,700 of these shares were accomplished on the New York Stock Exchange below the price of the last sale of that stock on that Exchange or at the same price as the last sale although that price was not above the next preceding different price. SEC Rule 10a-1(a), promulgated under the Commission's power to regulate short sales, forbids such sales on the "down-tick", that is, "below the price at which the last sale thereof, regular way, was effected on such exchange, or at such price unless such price is above the next preceding different price at which a sale of such security, regular way, was effected on such exchange."

B. The Proceedings Below

1. The District Court.

Because the Court of Appeals ultimately took a different view of the object of the conspiracy with which Petitioner was charged, it is necessary to set forth in some detail those proceedings which show the prosecution's theory and the Court's charge to the jury on this issue. The language of the indictment[2] is perhaps broad enough to support the Court

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[2] The Government obtained an indictment in eleven counts, of which Counts 1, 3, 4 and 5 were permitted to go to the jury, and resulted in conviction. Count 2 charged Peltz with bribing Weiner in violation of 18 U.S.C. § 201(b), and was dismissed on defendant's motion for lack of proof. (498A). Counts 6 and 7, which the government agreed to dismiss (481A), alleged violations of the "down-tick" rule with respect to other sales of Georgia-Pacific, in addition to those charged in Counts 3, 4 and 5. Counts 8, 9 and 10 charged Peltz with mail fraud in violation of 18 U.S.C. § 1431

of Appeals' construction that the conspiracy charged was not limited to obtaining information about Georgia Pacific.[3] But, in opposing a motion to sever the trial of the conspiracy and bribery counts from the trial of the other counts, the Government formally construed

because he used the mails in connection with his representations to the brokers that he or his mother owned Georgia-Pacific stock. Of these, Count 9 was dismissed for lack of proof (501A), and Counts 8 and 10 were dismissed by the Court because there was not "really an improper using of the mails in a scheme to defraud" and because these counts were duplicitous (504-505A). Count 11 charged a violation of § 32 of the 1934 Securities Act and Rule 10b-5 on an alternative theory—that in selling Georgia-Pacific stock, Peltz failed to disclose the information concerning Georgia-Pacific which he had received from Weiner. The Government consented to its dismissal also (481A).

[3] The conspiracy is defined in the indictment as follows:

> "1. From on or about the 1st day of January, 1966 up to and including the date of the filing of this indictment, in the Southern District of New York, PHILIP PELTZ, the defendant, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree with other persons including an employee of the United States and the Securities and Exchange Commission, to defraud the United States and an agency thereof, to wit, the Securities and Exchange Commission of and concerning their rights to have their business conducted impartially and according to law and to have the securities laws of the United States administered impartially and according to their terms.
>
> 2. It was a part of such conspiracy thtat PHILIP PELTZ, the defendant, would directly and indirectly obtain from employees of the United States and Securities and Exchange Commission confidential inside information about matters under consideration by the Securities and Exchange Commission and its staff including action concerning the Georgia Pacific Corporation, and would use such information for private profit." (5A).

There follows the indictment's description of the "OVERT ACTS" committed "in pursuant of said conspiracy and to effect the object thereof." (6A).

Count I in a way inconsistent with the construction it subsequently urged in its brief in the Court of Appeals, and which that Court adopted. The Government said:

> "Thus Count I charges a conspiracy between Peltz and an SEC employee to misuse confidential information concerning Georgia Pacific for profit, and charges as overt acts in furtherance of the conspiracy that the defendant Peltz made sales of Georgia Pacific stock on April 7, 11 and 12."[4] (38A)

The Government again declared the limits of its conspiracy charge in its opening statement to the jury:

> "Very briefly, to summarize what the government's case will be in a few sentences, the government will prove to you beyond any reasonable doubt that in the spring of the year 1966 this defendant entered into a criminal conspiracy with an official of the United States Securities and Exchange Commission in Washington, a man whose name you will learn is Murray B. Weiner.
>
> We will prove to you beyond a reasonable doubt that pursuant to this unlawful conspiracy between the defendant Peltz and Murray Weiner, Murray Weiner broke United States Government rules and regulations and unlawfully disclosed to

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[4] The Government "represent[ed] to the Court that the Government's proof will in fact show that the offenses charged in the indictment were not only 'transactions connected together' but also constituted part of 'a common scheme or plan' by the defendant Peltz. Briefly, the Government will prove that in the spring of 1966 the defendant Peltz, in return for supplying the services of one or more prostitutes, received from an SEC Branch Chief named Murray Weiner confidential, inside information to the effect that the SEC was about to institute a civil suit involving Georgia Pacific Corporation, which might be expected to depress the market price of Georgia Pacific stock." (38-39A).

> this defendant, Philip Peltz, confidential information concerning an investigation which was being conducted by the Securities and Exchange Commission in Washington into the affairs of a large U. S. corporation called Georgia Pacific." (55A-56A).

The trial court made clear that it understood that the "indictment charges with respect to the Georgia Pacific transaction" (498A). Most significantly, the court so charged the jury: "In this case the government contends that the conspiracy was to accomplish an unlawful purpose, *the unauthorized disclosure by Weiner to Peltz, in advance, of confidential information with respect to an investigation of Georgia Pacific Company and a prospective lawsuit against it.*" (501A; emphasis added).

2. The Court of Appeals.

The Court of Appeals affirmed Petitioner's conviction on all four counts.

With respect to the conspiracy count the Court held first that the evidence was sufficient to show an agreement between Peltz and Weiner:

> "[T]he testimony permitted a rational conclusion that there was a working relationship between the two men. Apart from the evidence of earlier tips, the recipient of unsolicited information would normally not feel entitled to pursue the informant with inquiries why the tip had not been made good or request his help in getting a broker. While it is unnecessary to a conspiracy that the relationship contemplated mutual benefit, however unlikely the contrary might be, the jury could have found an agreement that Weiner was to be re-

warded by Peltz' procuring female company,[2] and, indeed, that he had been given some reason to expect money as well.

"[2] We see no error in the judge's having allowed the jury to find that Miss Parkhurst's assignation with Weiner in February 1966 was an overt act *in pursuance of the general conspiracy charged in the indictment* even though it antedated Weiner's first knowledge of the Georgia Pacific investigation. Past favors can constitute consideration for action as much as the promise of future ones." (p. 5a, *infra*, emphasis supplied).[5]

Stating "we do not pretend to understand exactly where *Ruston* v. *Maryland*, 395 U.S. 784, 788-91 (1969), leaves the 'concurrent sentence doctrine,'" (p. 8a, *infra*), the Court then turned its attention to the 1934 Securities Act counts.

For present purposes the Court's most significant determination was that defendant had, within the meaning of § 32(a) of the 1934 Securities Act, "willfully" violated SEC regulations. The Court held that this section requires the prosecution to prove "a realization on the defendant's part that he was doing a wrongful act" and "that the act be wrongful under the securities laws and that the knowingly wrongful act involve a significant risk of effecting the violation that has occurred" (p. 12a-13a, *infra*).[6]

[5] The Court also held on the authority of *Haas* v. *Henkel*, 216 U.S. 462, 476-80, that the statute was applicable even though "the Government suffered no pecuniary harm and there was no intention to prevent its taking the action contemplated" (pp. 5a-8a, *infra*).

[6] The Court accepted the Government's theory that a violation of Rule 10b-5 was made out because Petitioner's misstatements with respect to his ownership of Georgia Pacific stock were willfully and knowingly made and because of their effect on his brokers. The Court also held, in reliance on its own decision in *A. T. Brod & Co.* v. *Perlow*, 375 F.2d 393, 397 (a civil case) that there can be criminal liability for violation of Rule 10b-5 even if "the fraud was not related to the investment value of the security" (p. 9a,

REASONS FOR GRANTING THE WRIT

The evidence adduced by the Government shows that the defendant had engaged in sharp practice and explains why the Government chose to transform a single scheme into an eleven-count indictment on a multiplicity of legal theories.[7] But, "under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." *Parr* v. *United States*, 363 U.S. 370, 394.

I. THE JUDGMENT BELOW DENIES PETITIONER DUE PROCESS OF LAW

In *Cole* v. *Arkansas*, 333 U.S. 196, 202, this Court held:

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

The decision below does not conform to that standard of due process because Petitioner's conviction on the conspiracy count was affirmed not on the basis on which he was tried and convicted, but on a new and entirely

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infra). With respect to the violation of Rule 10a-1 the Court held that defendant's misstatements to the brokers created a sufficient risk that the short sales would be made in violation of the SEC regulations so that he was properly charged with violating that regulation.

[7] With respect to the mail fraud counts, the trial court inquired: "Weren't the letters sent in connection with the short sale transactions, and isn't this really fragmentizing the charge?" The prosecuting attorney responded: "I don't think so, your Honor. Number 1, I think the government is entitled, *especially where some of its charges involve a provision which is not frequently used as a criminal provision such as both the 10(b)(5) charges and the down tick charges*, I think the government is entitled to charge in an indictment all those crimes which it can fairly prove at trial." (emphasis added) (500A-501A).

different theory of the conspiratorial agreement. See pp. 6-10, *supra*.

Strict adherence to the *Cole* rule is essential because it safeguards two important procedural rights. First, it assures that the defendant's guilt will be determined at all levels on the basis of the charge of which he had notice. This is essential since, in Mr. Chief Justice Hughes' words: "Conviction upon a charge not made would be sheer denial of due process." *DeJonge* v. *Oregon*, 299 U.S. 353, 362. See also, *In re Ruffalo*, 390 U.S. 544, 550-551; *In re Gault*, 387 U.S. 1, 33; *In re Oliver*, 333 U.S. 257, 273. Second, the *Cole* rule is necessary to assure that a verdict will not be sustained on appeal if it "might have rested on an impermissible ground." *Grunewald* v. *United States*, 353 U.S. 391, 415. Of the countless instances in which this rule has been applied,* *Grunewald* is particularly apposite. There, as here, the Court of Appeals for the Second Circuit affirmed a conspiracy conviction by attributing a broader objective to the conspirators than was contemplated by the jury instructions. But this Court reversed, "for we cannot agree with the Court of Appeals' holding that this theory of the case was adequately submitted to the jury," 353 U.S. at 411; see also, *id.* at 415. The same vice infects the decision below. Thus, both objectives of *Cole* were defeated when the Court of Appeals permitted Petitioner's "conviction to rest on one point and the affirmance of the conviction to rest on another." *Russell* v. *United States*, 369 U.S. 749, 766.

Indeed, while *Cole* states a general principle, applicable to all criminal prosecutions, the notorious difficulty of defending against conspiracy charges rein-

* The most recent is last term's unanimous decision in *Bachellar* v. *Maryland*, 397 U.S. 564, 570-571.

forces the urgency of protecting alleged conspirators against shifting theories concerning the scope of their agreement, which is the "gist of the crime of conspiracy as defined by the statute." *Braverman* v. *United States*, 317 U.S. 49, 53.

In *Shuttlesworth* v. *Birmingham*, 376 U.S. 339, this Court summarily reversed the decision of a state court which had violated the *Cole* principle. The same disposition as in *Shuttlesworth* would be called for here, if the judgment below did not raise a further question which independently merits plenary consideration by this Court.

II. THE JUDGMENT BELOW RAISES AN IMPORTANT QUESTION UNDER THE SECURITIES EXCHANGE ACT OF 1934

The Court of Appeals' affirmance on the Securities Act counts raises an important and recurring question of statutory interpretation which has not been but should be settled by this Court—what is the meaning of the "willfulness" requirement in § 32(a) of the Securities Exchange Act of 1934, which provides that "any person who willfully violates any provision of this title or any rule or regulation thereunder is guilty of a crime * * *?" This provision governs all criminal proceedings under the Act, and its language is used also in the criminal provisions of all other federal securities legislation.[9]

An authoritative determination by this Court is urgent because the Court of Appeals' construction of

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[9] See § 24 of the Securities Act of 1933, 48 Stat. 87, 15 U.S.C. § 77x; § 29 of the Public Utility Holding Company Act of 1935, 49 Stat. 836, 15 U.S.C. § 79z-3; § 325 of the Trust Indenture Act of 1939, 53 Stat. 1777, 15 U.S.C. § 77yyy, § 48 of the Investment Companies Act of 1940, 54 Stat. 846, 15 U.S.C. § 80a-48; and § 17 of the Investment Advisors Act of 1940, 54 Stat. 857, 15 U.S.C. § 80b-17.

§ 32(a) involves ambiguities in this complex area of enforcement which will inevitably confuse future litigation, and so dilutes the willfulness element of the offense that almost all infractions of the securities laws will be crimes. The latter consideration is of great practical importance because of its potential for inhibiting securities transactions generally: Businessmen will be unwilling to hazard the risk of criminal prosecution for transactions which may even potentially be held to transgress the Act, or a regulation promulgated thereunder, if they can be convicted without proof that they intended to bring about the evil at which it was directed.

The Court of Appeals held, and we agree, that the Government need not prove knowledge of the SEC rule which has been violated in order to establish criminal liability. But, as the Court recognized, this conclusion (which is compelled by the language of the statute) "still leaves the question what mental state [the Government] must prove" (p. 12, *infra*). In answering that question, the Court relied heavily on an article which the late Judge Herlands wrote at a time when he was an Assistant United States Attorney.[10] The Court said (pp. 12a-13a, *infra*):

> "The Herlands article concluded it was necessary only that 'the prosecution establishes a realization on the defendant's part that he was doing a wrongful act,' 21 Va.L.Rev. at 149. We accept this with the qualifications, doubtless intended by the author, that the act be wrongful under the securities laws and that the knowingly wrongful act involve a significant risk of effecting the violation that has

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[10] Herlands, *Criminal Law Aspects of the Securities Exchange Act of 1934*, 21 Va. L. Rev. 139 (1934).

occurred. See A.L.I. Model Penal Code, § 2.03 (1962); Study Draft of a New Federal Criminal Code, § 305 (1970)."

The chief difficulty in understanding this standard is the first "qualification"—"that the act be wrongful under the securities laws." This language adds nothing to the willfulness requirement, since if conduct is not "wrongful under the securities laws", it cannot come within § 32(a), whatever "willfully" may mean.[11] Moreover, this "qualification" does not deal with the "mental state" of the actor which the Court acknowledges to be the function of "willfully." It is therefore difficult to believe that the Court intended its phrase "wrongful under the securities laws" to be taken at face value, and one must search for possible alternative meanings. When the phrase in question is read together with the further qualification that "the knowingly wrongful act involve a significant risk * * *" (p. 12a, *infra*), the possibility suggests itself that the Court intended the word "knowingly" to be understood in the first phrase as well. On that view, the first "qualification" would require the prosecution to prove that the act was "knowingly wrongful under the securities laws." This interpretation reads some content into the Court's words, but it cannot be attributed to the Court with any degree of confidence, for it presents a new difficulty, namely, that it is inconsistent with the Court's explicit—and we think sound—holding that the defendant need *not* know that his act is in violation of a Commission regulation. Thus, it is unclear which of these materially different interpretations of its formu-

[11] § 32(a) establishes criminal penalties only for "willful violations" only of "any provisions of this title or any rule or regulation thereunder * * *."

lation reflects the Court of Appeals' true intention; one can only conclude that neither is a satisfactory element of any definition of "willfulness."

Further difficulties are created by the additional qualification "that the knowingly wrongful act involves a significant risk of effecting the violation that has occurred" (p. 12a-13a, *infra*). Again, this test does not deal with the actor's mental state but rather with the objective circumstances surrounding his act, namely, the probability of risk created. This is one element which may in certain situations be material in determining culpability. The actor's mental state is another —and entirely different—element, and the only one encompassed by "willfully" in § 32(a). The Court's injection of the "causation" factor into its construction of § 32(a) can only serve to further confuse the law.[12]

Even as the "qualifications" portend serious difficulties in applying the Court of Appeals' willfulness standard, the core definition—that the defendant realize

[12] Nothing in the Study Draft of a New Federal Criminal Code, cited by the Court (p. 13a, *infra*), justifies the intermingling of these diverse elements of culpability. Rather, § 305 thereof (to which the Court specifically refers) discusses "causation," while the various forms of mental state are defined in a different section, 302, where "willfully" is deliberately given "a meaning clearly different from its variable and uncertain meaning in existing law" (Study Draft, p. 26). The Court of Appeals' adoption of § 305 of the Study Draft as part of the willfulness standard under § 32(a) of the Securities Act is surprising also because the Commission itself has substantial doubts as to its value. Section 305 was "included in the study draft, in order to elicit comment," but was excluded from the tentative draft because the "drafters of the basic provisions on liability have been unable to develop an explanatory formula of causation which is both accurate and meaningful." See Extended Note A, "Causation" in Working Papers of the National Commission on Reform of Federal Criminal Laws, at pp. 142, n.*, and 147.

that he was "doing a wrongful act" (p. 12a, *infra*)—is unsound because it fails to distinguish adequately between violations which should be subject only to civil remedies and those for which criminal penalties are just. Unless this distinction is preserved by the definition of the criminal state of mind, all substantive provisions of the Act and regulations which declare conduct to be "unlawful" will be penal laws. They would then be subject to the narrowing rule of construction of penal laws generally.

This problem was recognized by this Court in *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 192-193. There, Respondents had argued, citing *FCC* v. *American Broadcasting Corporation*, 347 U.S. 284, that the substantive provisions of the Investment Advisors Act[13] must be read narrowly because the interpretation would be binding in criminal as well as civil litigation.[14] This Court rejected the argument (375 U.S. at 192, n. 40):

> "Neither is this a criminal proceeding for 'willfully' violating the Act, 54 Stat. 857, as amended, 15 U.S.C. § 80b-17, nor a proceeding to revoke or suspend a registration 'in the public interest,' 54 Stat. 850, as amended, 15 U.S.C. § 80b-3. Other considerations may be relevant in such proceedings. Compare Federal Communications Comm'n v. American Broadcasting Co., 347 U.S. 284."

Since *Capital Gains* was an injunction case, the Court did not construe the term "willfully." However, the opinion indicates an understanding that under the Investment Advisors Act (which was treated as *in pari*

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[13] 54 Stat. 847, as amended, 15 U.S.C. § 80b-1, *et seq.*

[14] Brief for Respondent, No. 42, October Term, 1963, p. 13.

materia with other securities legislation, including the Securities Act of 1934, see 375 U.S. at 186), it is the element of willfulness, rather than a narrowing construction of the substantive provisions, which must serve to limit the scope of the criminal sanction.

If the term "willfully" is to adequately fulfill its function of preventing criminal prosecution for technical or innocuous violations of the securities laws, it should be held to require proof of a specific intent to bring about a result which the statute or regulation is designed to prevent.[15] This construction is necessary also to avoid the serious problems of vagueness inherent in the 1934 Securities Act and regulations thereunder.[16] That is precisely what this Court did when it construed what is now 18 U.S.C. § 242 in *Screws* v. *United States*, 325 U.S. 91, and *United States* v. *Williams*, 341 U.S. 70; see also *United States* v. *National Dairy Products*, 372 U.S. 29, 35.

The construction which we propose appears to be consistent with Judge Herlands' view, since his definition

[15] It would not be necessary to show specific intent to violate a particular statute or regulation.

[16] The most notable examples of provisions failing to give notice of what they prohibit are § 10(b) of the Act and Rule 10b-5 thereunder. The predecessor of § 10(b) was described by the administrative spokesman for the bill as saying "[t]hou shall not devise any other cunning devices." Thomas G. Corcoran, Esq., in Hearings before House Com. on Int. & For. Commerce, 73d Cong., 2d Sess. p. 115. See generally 3 Loss, *Securities Regulation*, p. 1424 (1961). Rule 10b-5 has aptly been termed a "catchall" fraud provision, but as this Court once said: "To say that a provision is a 'catchall', is not to define what it catches." *Flora* v. *United States*, 362 U.S. 145, 149. This Court has acknowledged the importance of Rule 10b-5 and the difficulties of interpretation which it creates. *SEC* v. *National Securities Corp.*, 393 U.S. 453, 464; see also, *id.* at 470 (Harlan, J., dissenting).

of "willfully" was not the one which the Court of Appeals attributed to him. Judge Herlands said:

> "A question which suggests itself is whether *mens rea* is necessary for criminal violations and, if so, what its content will be. Recent tendencies in criminal law raise the possibility that no intent will be essential. In some quarters, where the psychological viewpoint has been applied to legal problems, it is argued that behavior alone is the determining factor of criminality. The classical conception of a crime was that 'there must be first a vicious will, and secondly an unlawful act consequent upon such vicious will.' *The express requirement of 'willfulness' in Section 32 and the seriousness of the possible penalty thereunder warrant the belief that 'guilty intent' will be required for prosecutions under this statute. The word 'willfully' in the ordinary sense in which it is used in penal statutes means 'not merely "voluntarily" but with a bad purpose.' And such was the definition which the Congressional Committees intended the word to have in the present legislation.*" 21 Va.L.Rev. at 145-148, footnotes omitted, emphasis supplied.

"Guilty intent" is not further refined, but it can fairly be read to encompass an intent to bring about a particular (forbidden) objective. The Court of Appeals went astray because it mistook Judge Herlands' definition of "knowingly" (21 Va. L. Rev. at 148-149)[17] for his con-

[17] The term "knowingly" appears in a subsequent clause of Section 32(a) which prohibits "willful and knowing" misstatements in reports or other filings required under the Act or any regulation. See pages 19a-20a, *infra*. The passage which the Court of Appeals cited and on which it mistakenly relied (p. 12a, *infra*) was

> "The requirement of 'willfulness' in the general provision quoted above is to be contrasted with the requirement of 'willfulness *and knowledge*' which appears in the specific provision. The variation of language in this respect between the two provisions throws light on the meaning of these requirements of a criminal state of mind. This deliberate change in language indicates that 'knowledge' of the precise illegality of the act

struction of "willfully." Thus, while exclusive reliance on even the most distinguished scholarship is rarely an adequate substitute for independent judicial consideration of the history and purpose of an important statutory provision, the Court of Appeals' error here was not merely one of method. In short, the Court of Appeals' reading of "willfully" is of such doubtful merit and carries with it such undesirable consequences that Section 32(a) of the Securities Exchange Act of 1934 should now be given a definitive construction by this Court.

CONCLUSION

By reason of the foregoing, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 18, 1970

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is not required as a mental element of the crimes under the general provision. In other words, the defendant need not be shown to have had knowledge of the particular statute or rule which he violated, provided the prosecution establishes a realization on the defendant's part that he was doing a wrongful act. Under the specific provision the prosecution must show that the defendant had actual knowledge of the false or misleading character of the statement made by him." (21 Va. L. Rev. at 148-149). (Emphasis in original, footnote omitted.)

APPENDIX

APPENDIX A

Opinion and Orders of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 141—September Term, 1970.

(Argued September 17, 1970
Decided October 19, 1970.)

Docket No. 34578

UNITED STATES OF AMERICA, *Appellee*,

v.

PHILIP PELTZ, *Appellant*.

Before: FRIENDLY, SMITH and HAYS, *Circuit Judges*.

FRIENDLY, *Circuit Judge:*

After trial in the District Court for the Southern District of New York, Philip Peltz, an attorney was convicted on the four counts of an indictment which Judge Weinfeld submitted to the jury. Count One charged that Peltz had conspired with an employee of the Securities and Exchange Commission to defraud the United States and the Commission of their rights to have their business conducted impartially and according to law and to have the securities laws administered impartially and according to their terms, in violation of 18 U.S.C. § 371. Counts Three and Four charged willful violations of § 10(b) of the Securities Exchange Act of 1934 and the SEC's Rule 10b-5 in that Peltz had told two brokerage houses that sales of the common stock of Georgia Pacific Corporation which he had ordered were long whereas in fact they were short. Count Five charged that Peltz willfully violated § 10(a), relating to

short sales, and the Commission's Rule 10a-1(a). The court imposed four concurrent one-year sentences, three months of which were to be served in prison; the remainder of the term was suspended as to each count.

The first count charged that from about January 1, 1966, Peltz had conspired with others, including an employee of the SEC, to obtain confidential inside information about matters under consideration by the Commission and use such information for private profit. Specific mention was made of the Georgia Pacific Corporation and Peltz' sales of its stock. The proof identified the employee as Murray B. Weiner, a branch chief of the SEC's corporation finance division.

Essential background was furnished by the testimony of Ira Pearce, who at the time was a branch chief of the SEC's trading and markets division and whose integrity was not in question. On or about March 11, 1966, Pearce had recommended that the SEC bring suit against Georgia Pacific because the company had apparently been purchasing its own securities through a pension fund it controlled, thereby influencing the market for its own stock in violation of the securities laws. The Commission approved the suit on or about March 24. During April Weiner asked Pearce about the current status of the matter, and Pearce kept him posted as to the target date for the filing of the action. This was originally April 15 but was postponed to April 27.

On April 7, Peltz telephoned a registered representative at Bache & Co., told him he was thinking of selling 1,000 shares of Georgia Pacific which he owned because he had heard there was a lawsuit pending against the company, and directed him to sell the shares at no less than a specific price. In fact, Peltz did not own the shares at that time. On the same day, he instructed a registered representative at Loeb, Rhoades & Co. to sell 2,000 shares allegedly belonging to his mother but, according to the proof, not in fact owned by her. Four days later Weiner asked a former SEC attorney to recommend a broker for Peltz; the attorney

suggested a representative at Sterling, Grace & Co., with whom Peltz placed sell orders for 300 shares as long sales. The proof again was that Peltz did not own these shares. All of Peltz' sales instructions were carried out. He made various excuses for not delivering the shares on the settlement dates but, after the SEC suit was announced and the price of Georgia Pacific fell, he borrowed enough money to enable him to cover his short sales and make a tidy profit.

The most damaging testimony against Peltz was given by a friend, Norman Horwitz, an attorney with experience in securities matters, and Horwitz' wife, Sheila, who in April 1966 was his fiancée. According to them, Peltz indicated that he had a "contact" at the SEC who had previously given him information about several companies that were to be or had been investigated by the agency. On April 14, Peltz told them, in Sheila's apartment in New York City, that he had obtained information from his "contact" at the SEC concerning proposed action against Georgia Pacific and had sold several thousand shares, but that he was having trouble "buying in" because the SEC had not made its announcement and the price of the stock had not yet dropped. Peltz then accompanied Horwitz to the latter's office and placed a call to a number identified as Weiner's residence in Maryland. After completing the call, he declared that "Everything is okay, it's going to be released in a day or two, they're working on the final papers." Sheila testified that Peltz telephoned her apartment several times during the following week. Once he asked her to inform Horwitz that he thought news of the investigation would shortly break; on other occasions he simply provided progress reports. In a subsequent conversation, he told her that in his law practice he had defended prostitutes and "sometimes he would get the company of these girls for his friend in Washington." Early in May, Peltz expressed concern about being watched by the FBI and, in answer to an inquiry whether he had paid money, said he had not but "expected this fellow would be in shortly" and hoped to avoid paying or seeing him.

A Miss Parkhurst testified that in February 1966 Peltz had phoned her to say that he had a friend called Mel Fein (a name evidently used for Weiner [1]), to whom he owed a favor and who was at another friend's apartment. Peltz was unable to entertain him and asked Miss Parkhurst to help. She obliged by going to the apartment and having sexual relations with "Fein." Some two months later, she reported to Peltz that she had received a call from "Fein." Peltz became hysterical and told her not to see "Fein" again because he was involved in something and that she should not discuss "Mr. Fein or anything" with the F.B.I. if they came to investigate.

I.

The statute, 18 U.S.C. § 371, on which Count 1 was based, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The portion of the enactment relating to defrauding the Government is peculiar, perhaps even unique, in the federal penal code in that its punishes a conspiracy to defraud although the fraud may not constitute a substantive offense under any of the statutes dealing with various forms of corrupting government employees.

Peltz' first argument is that the evidence was insufficient to show an agreement between himself and Weiner, as dis-

[1] At trial, Miss Parkhurst was shown two photographs both of which were apparently of Weiner. She testified that "The gentleman on the left is Mel Fein," and the photograph on the right "looks like him," but she was not "positive."

tinguished from a disclosure solely at the latter's initiative, which the Government concedes would not constitute a violation of the conspiracy statute however offensive such conduct would be. But the testimony permitted a rational conclusion that there was a working relationship between the two men. Apart from the evidence of earlier tips, the recipient of unsolicited information would normally not feel entitled to pursue the informant with inquiries why the tip had not been made good or request his help in getting a broker. While it is unnecessary to a conspiracy that the relationship contemplated mutual benefit, however unlikely the contrary might be, the jury could have found an agreement that Weiner was to be rewarded by Peltz' procuring female company,[2] and, indeed, that he had been given some reason to expect money as well.

Peltz' second challenge to his conspiracy conviction is that the statute is inapplicable when, as here, the Government suffered no pecuniary harm and there was no intention to prevent its taking the action contemplated. This meets the seemingly insurmountable obstacle of the holding in *Haas* v. *Henkel*, 216 U.S. 462, 476-80 (1910), that Rev. Stat. § 5440, the predecessor of 18 U.S.C. § 371, prohibited an alleged conspiracy to obtain information from an employee of the Department of Agriculture in advance of the regular release dates of its cotton crop reports and to use such information for speculation upon the cotton market.[3] Peltz' contention that *Hammerschmidt* v. *United*

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[2] We see no error in the judge's having allowed the jury to find that Miss Parkhurst's assignation with Weiner in February 1966 was an overt act in pursuance of the general conspiracy charged in the indictment even though it antedated Weiner's first knowledge of the Georgia Pacific investigation. Past favors can constitute consideration for action as much as the promise of future ones.

[3] Although one count of the *Haas* indictment alleged that the conspiracy included the making of a false report, 216 U.S. at 478-79, the decision went far beyond that.

States, 265 U.S. 182 (1924), casts doubt upon this highly apposite decision misreads the opinion in the later case. Relying on Mr. Justice Lurton's statement in *Haas* that "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government," 216 U.S. at 479, the United States in *Hammerschmidt* sought to bring within the statute a conspiracy to urge persons subject to the Selective Service Act to disobey it. In ruling that the indictment did not charge an offense within the statute, the Court narrowed the language just quoted from *Haas* but not the holding. Noting that in *Haas* the element of trickery was clear and the only issue was whether pecuniary loss to the Government was also required, Chief Justice Taft explained, 265 U.S. at 188:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery, or at least by means that are dishonest.

Despite academic criticism, see A. Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405 (1959), the Court has shown no disposition to recede from that view. In *United States* v. *Johnson*, 383 U.S. 169, 172 (1966), the Court thought it clear that *Haas* would cover the case of a Congressman's acceptance of money for the use of his influence in endeavoring to induce the Department of Justice to dismiss mail fraud indictments, although no pecuniary loss to the United States would result from such action and the defendants "were not charged with 'any false statement, misrepresentation or deceit,'" see *Dennis* v. *United States*, 384 U.S. 855, 861 n. 5 (1966). That the receipt of consideration likewise is not essential is shown by the

statement in *Dennis* v. *United States*, *supra*, 384 U.S. at 860-61 (1966), that a conspiracy to obtain the services of the NLRB by filing false non-Communist affidavits came within 18 U.S.C. § 371. An agreement whereby a federal employee will act to promote private benefit in breach of his duty thus comes within the statute if the proper functioning of the Government is significantly affected thereby.

It scarcely needs argument that the high repute and effective functioning of the SEC—conspicuous for its zeal in preventing the misuse of inside information, see, e.g., Cady, Roberts & Co., 40 SEC 907 (1961); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2 Cir. 1968), *cert. denied*, 394 U.S. 976 (1969)—would be significantly compromised by arrangements whereby an individual could obtain information about its impending action from one of its employees and profit from having such knowledge before this became available to the public generally.[4] Public confidence essential to the effective functioning of government would be seriously impaired by any arrangement that would enable a few individuals to profit from advance knowledge of governmental action. The very making of a plan whereby a government employee will divulge material information which he knows he should not is "dishonest" within Chief

[4] In thus noting the peculiar irony of the use of inside information of impending SEC action, we do not mean at all to limit our holding to that agency. Similar considerations would apply in many other instances that readily come to mind. Arrangements to obtain advance information with respect to rate decisions of the ICC, FPC, FCC, and CAB, of merger decisions of the ICC, of the issuance of television licenses by the FCC or airline certificates by the CAB, or of the approval or disapproval of foods or drugs by the FDA, are only a few examples. An arrangement with the secretary or law clerk of a federal judge to secure advance information with respect to a decision having implications for the stock market would be another.

Justice Taft's language in *Hammerschmidt*,[5] regardless of whether such plan is secured by consideration.

II.

If this opinion had been written prior to June 23, 1969, it could have stopped at this point. Peltz' sentences on the two § 10(b) and the § 10(a) counts were concurrent with the sentence on the conspiracy count, and we see no likelihood that submission of the latter would have had a prejudicial "spill-over" on the conspiracy conviction. See *United States* v. *Hines*, 256 F.2d 561, 562-63 (2 Cir. 1958). While we do not pretend to understand exactly where *Benton* v. *Maryland*, 395 U.S. 784, 788-91 (1969), leaves the "concurrent sentence doctrine," see *United States* v. *Febre*, 425 F.2d 107, 113-14 (2 Cir. 1970), the question is so obscure and the issues with respect to the §§ 10(b) and 10(a) counts are sufficiently likely to recur that we think it best to consider Peltz' attacks on these convictions.

Section 32(a) of the Securities Exchange Act, discussed in more detail in Part III of this opinion, makes criminal any willful violation of any provision of the act or any rule or regulation thereunder the violation of which is made unlawful. Section 10(b) of the Act and the Commission's Rule 10b-5 thereunder, both too familiar to warrant quotation, admittedly qualify under this test. The Government's submission was that by Peltz' assertions to Loeb, Rhoades & Co. and to Bache & Co. with respect to ownership of the stock of Georgia Pacific whose sale he directed, he willfully and knowingly made untrue statements of material facts and engaged in acts that would operate as a fraud or deceit in connection with the sale of a security.

Prima facie this would seem entirely clear. The immediate consequence of the lies was that the brokerage houses

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[5] See also the statement in *Hammerschmidt* that the words "to defraud" "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching," 265 U.S. at 188.

did not demand the 70% collateral required by the then applicable regulation of the Federal Reserve Board, 12 C.F.R. § 220.3, for short sales. As a result the firms were exposed to risk of serious loss when, as turned out to be the case, Peltz did not deliver the stock on the normal settlement date. Also, as we shall see, the lies caused the brokerage firms to violate § 10(a) and Rule 10a-1 relating to the price at which short sales can lawfully be made. Even though these violations of the margin and short sale rules were unwitting, the brokers were subject to possible disciplinary proceedings by the New York Stock Exchange. Despite the caveat in *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 192 n. 40 (1963), we see no more reason for requiring proof of actual (as distinguished from potential) injury in a criminal prosecution than in a suit for an injunction in a securities fraud case.

Indeed, Peltz does not so contend. His position is rather that there can be no criminal liability for violations of § 10(b) and Rule 10b-5 "where the fraud was not related to the investment value of securities." Recognizing our decision in *A. T. Brod & Co.* v. *Perlow*, 375 F.2d 393, 397 (1967), that the placing of purchase orders with the intent to pay only if the securities had appreciated by the settlement date gave rise to civil liability under the statute and the rule, he argues that the same words must have a narrower application in criminal prosecutions. We are not convinced of this, Herlands, Criminal Aspects of the Securities Exchange Act of 1934, 21 Va. L. Rev. 139, 162 (1934), nor do we believe that Peltz' formulation would be appropriate if any narrowing were to be done. Short selling without compliance with the margin and short sale price rules can have a materially larger adverse effect on the public than a seller's hoodwinking a buyer into an unfortunate purchase of a few hundred shares.[6]

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[6] With respect to the issue whether Peltz in fact lied to Loeb, Rhoades & Co. concerning his mother's owning the 2,000 shares he directed to be sold, Peltz here complains for the first time that

III.

Section 10(a) of the Securities Exchange Act of 1934 makes it unlawful "for any person, directly or indirectly, by the use . . . of any facility of any national securities exchange" to effect a short sale of any security registered on a national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary in the public interest or for the protection of investors. The Commission's Rule 10a-1(a), sometimes called the "down-tick" rule, provides:

> No person shall, for his own account or for the account of any other person, effect on a national securities exchange a short sale of any security (1) below the price at which the last sale thereof, regular way, was effected on such exchange, or (2) at such price unless such price is above the next preceding different price at which a sale of such security, regular way, was effected on such exchange . . . .

The Government established that Rule 10a-1(a) had been violated in the case of 1700 of the 3000 Georgia Pacific shares Peltz ordered to be sold on April 7, 1966.

Peltz' first contention, that the statute and rule apply only to brokers and dealers, requires little discussion. The statute speaks of "any person" and the intention to go beyond the "person" actually arranging the trade is made

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the prosecutor commented on her presence in court and the defense's failure to call her and argued that the most reasonable inference was that her testimony would not have been favorable. He similarly complains that the judge told the jury it might infer that her testimony would have been unfavorable to the Government or to the defendant or to both, or might draw no inference at all, and that, in its deliberations about this, it might take the relationship into account. While such objection comes much too late, the comment was fair argument, and the charge was right, *United States* v. *Beckman*, 155 F.2d 580, 584 (2 Cir. 1946); *Felice* v. *Long-Island R.R.*, 426 F.2d 192, 194-95 (2 Cir. 1970).

manifest by the phrase "directly or indirectly." The rule is even clearer in covering the person for whose account the sale is made as well as the person making it. See *United States* v. *Mandel*, 296 F. Supp. 1038, 1040 (S.D.N.Y. 1969). We thus would have no doubt that a customer explicitly instructing a broker to make a short sale in contravention of Rule 10a-1(a) would be as much subject to criminal liability as the broker who carried out the instruction.

However, there was no evidence that Peltz gave any such instruction and we must confront the issue whether a customer "willfully" violates Rule 10a-1(a) when he deliberately makes a false statement to a broker that he owns securities directed to be sold and there is a resulting violation of the rule, because the broker, having no reason to think that the rule was applicable, failed to take the precautions that would prevent such a violation. In considering this question it will be helpful to have the full text of § 32(a) of the Securities Exchange Act before us:

> Any person who willfully violates any provision of this title, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

The language makes one point entirely clear. A person can willfully violate an SEC rule even if he does not know of its existence. This conclusion follows from the difference between the standard for violation of the statute or a rule or regulation, to wit, "willfully," and that for false or misleading statements, namely, "willfully and knowingly." It follows also from the proviso whereby lack of knowledge of a rule or regulation prevents imprisonment but not a fine.[7] All this was pointed out in a penetrating article written by the late Judge Herlands many years before his appointment to the federal bench, Criminal Law Aspects of the Securities Exchange Act of 1934, *supra*, 21 Va. L. Rev. at 148-49.

Decision that the Government need not prove knowledge of Rule 10a-1(a)[8] in order to establish criminal liability still leaves the question what mental state it must prove. The Herlands article concluded it was necessary only that "the prosecution establishes a realization on the defendant's part that he was doing a wrongful act," 21 Va. L. Rev. at 149. We accept this with the qualifications, doubtless intended by the author, that the act be wrongful under the securities laws and that the knowingly wrongful act involve a significant risk of effecting the violation that

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[7] Peltz made no effort to bring himself within this proviso.

[8] Horwitz testified that on at least three occasions Peltz called him to ask "whether or not selling stock without labelling it a short sale was crime; whether it had to be done on an up tick or not." However, these calls appear to have been some weeks after the sales of April 7. Although "the subsequent existence of a fact supports the inference of its earlier existence, when the subsequent condition is one which ordinarily would not exist unless it had also existed at the earler time," *United States* v. *Consolidated Launderies Corp.*, 291 F.2d 563, 569 (2 Cir. 1961), citing 2 Wigmore, Evidence (3rd ed.) 413-14, we are not at all sure that the inference here would be sufficiently strong to support a conviction if the Government was required to prove knowledge of the regulation beyond a reasonable doubt. Peltz' inquiries may well have stemmed from his concern arising from an FBI investigation.

has occurred. See A.L.I. Model Penal Code, § 2.03 (1962); Study Draft of a New Federal Criminal Code, § 305 (1970).

On this analysis the court was clearly justified in submitting the § 10(a) counts to the jury under proper instructions. There was ample evidence that Peltz was aware "he was doing a wrongful act," namely, telling the brokers he was long when he knew he was not. His false statements, negating the facts that would have induced the brokers to take the requisite steps to avoid a violation of 10a-1(a), created a serious risk that such a violation would occur, as it did. Cf. *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954).

The conviction on all four counts is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of October one thousand nine hundred and seventy.

Present: Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Hon. Paul R. Hays,
Circuit Judges.

United States of America, *Plaintiff Appellee,*

v.

Philip Peltz, *Defendant Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

34578

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

PHILIP PELTZ, *Defendant-Appellant*.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
J. JOSEPH SMITH
PAUL R. HAYS
Circuit Judges

November 18, 1970

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

34578

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

PHILIP PELTZ, *Defendant-Appellant*.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

November 18, 1970

APPENDIX B

Opinion Denying Motion To Set Aside Verdict or for New Trial

EDWARD WEINFELD, *D. J.*

The evidence of the conspiracy was substantial. As to the defendant Peltz, both direct and circumstantial evidence fully established his knowing participation therein. As to the participation of Weiner, the other co-conspirator, while the evidence was essentially circumstantial, this, too, was substantial and the jury was amply justified in acting upon it. The evidence as to Weiner outlined in the Court's charge included but was not limited to the advice obtained by Weiner from Pearce as to the status of the Georgia-Pacific investigation; the long distance telephone call made by Peltz to the number listed at Weiner's home address;[1] the defendant's statements to the Horwitzes after the telephone call; the long distance call by Weiner to Deutsch, asking the latter to recommend a broker to Peltz; and the sale within a day thereafter of 300 shares of Georgia-Pacific by Peltz through the recommended broker.[2]

As to the remaining counts, 3, 4 and 5, the defendant asserts that the government failed to prove the Georgia-Pacific stock was registered on the New York Stock Exchange. After the jury had been instructed, defense counsel took no exceptions to the charge; however, he did request an instruction that an essential element of counts 3, 4 and 5 was "as to whether or not it [Georgia-Pacific] actually was registered on the New York Stock Exchange."

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[1] *See generally* Van Riper v. United States, 13 F.2d 961, 968 (2d Cir.) (L. Hand, J.), *cert. denied sub nom.* Ackerson v. United States, 273 U.S. 702 (1926); United States v. LeBue, 180 F. Supp. 955 (S.D.N.Y. 1960).

[2] *Cf.* United States v. Lopez, Docket No. 33763 (2d Cir. Dec. 1, 1969); United States v. Branker, Docket No. 33517 (2d Cir. Nov. 17, 1969).

The request was withdrawn. As counsel acknowledged in withdrawing the request, registration is not an element under counts 3 and 4, which allege violations of section 10(b) of the Securities Exchange Act.[3]

With respect to count 5, the Court did charge that the government was required to establish as one of the essential elements "that (1) Georgia-Pacific common stock was registered on the New York Stock Exchange on April 7, 1966." As to this count, the defendant's motion for acquittal at the close of the government's case was based upon the alleged vagueness of Rule 10(a)(1) and not upon any claim that the government had failed to establish that the Georgia-Pacific shares were registered on the New York Stock Exchange. At the close of the entire case only a general motion was made for a directed verdict of acquittal. Had the issue of lack of proof been raised, the proof of that routine fact not only could have been submitted forthwith, but, in the light of the large scale trading of Georgia-Pacific on the New York Stock Exchange, which would be clearly unlawful if the stock were unregistered,[4] and the New York Stock Exchange rule prohibiting trading of shares unless registered,[5] judicial notice might also have satisfied the objection.[6] Indeed, the motion for acquittal on count 5, made on a

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[3] 15 U.S.C. § 78j(b) (1964); *see* Matheson v. Armbrust, 284 F.2d 670, 674 (9th Cir. 1960), *cert. denied*, 365 U.S. 870 (1961); Nemitz v. Cunny, 221 F. Supp. 571, 573-74 (N.D. Ill. 1963); *cf.* Tcherepnin v. Knight, 389 U.S. 332 (1967) (by implication).

[4] *See* Securities Exchange Act § 12(a), 15 U.S.C. § 78*l*(a) (1964).

[5] *See* Rules of Board of Governors, New York Stock Exchange ¶ 2495E.10.

[6] *Cf. Application of Knapp-Monarch Co.*, 296 F.2d 230 (C.C.P.A. 1961); United States v. Spagnuolo, 168 F.2d 768, 771 (2d Cir.), *cert. denied*, 335 U.S. 824 (1948); White v. United States, 167 F.2d 747 (D.C. Cir. 1948).

specific ground with no mention of failure of proof as to registration, may be deemed to constitute a waiver.[7]

The motion to set aside the verdict and for a judgment of acquittal is denied, as is the alternative motion for a new trial.

/s/ EDWARD WEINFELD
United States District Judge

Dated: New York, N. Y.
January 9, 1970

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[7] *Cf.* United States v. Rivera, 388 F.2d 545 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968); Gilbert v. United States, 359 F.2d 285, 288 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966). *See also* Hardwick v. United States, 296 F.2d 24, 25-26 (9th Cir. 1961).

APPENDIX C

Constitution, Statutes and Regulations Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 371 provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

§ 10 of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78j, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce of the mails, or of any facility of any national securities exchange—
>
> (a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any secudity not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 32(a) of the Securities Exchange Act of 1934, 48 Stat. 904, 15 U.S.C. § 78ff, provides:

> Any person who willfully violates any provision of this title, or any rule or regulation thereunder the violation of which is made unlawful or the observance

of which is required under the terms of this title, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Regulation 10a-1(a), 17 C.F.R. § 240.10a-1, of the Securities and Exchange Commission provides:

> No person shall, for his own account or for the account of any other person, effect on a national securities exchange a short sale of any security (1) below the price at which the last sale thereof, regular way, was effected on such exchange, or (2) at such price unless such price is above the next preceding different price at which a sale of such security, regular way, was effected on such exchange . . . .

Regulation 10b-5, 17 C.F.R. § 240.10b-5, of the Securities and Exchange Commission provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange.
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1128

PHILIP PEIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring with an employee of the Securities and Exchange Commission to defraud the United States, and of three substantive violations of the Securities Act of 1934. On January 9, 1970, he was sentenced to concurrent one year terms of imprisonment on each count, with all but three months suspended. A motion to set aside the verdict and for a judgment of acquittal was denied (Pet. 16a–18a); the court of appeals affirmed the conviction (Pet. 1a—13a).

414-436—71

The evidence is summarized in the opinion of the court below (Pet. 2a–4a). In essence, it shows that in April 1967, petitioner, an attorney, obtained inside information from Murray B. Weiner, a branch chief of the Securities and Exchange Commission, that the Commission was about to file a lawsuit against Georgia-Pacific Corporation which could be expected to produce a rapid decline in the price of the corporation's stock. On April 7 and April 11, 1967, petitioner sold a total of 3,300 shares of Georgia-Pacific stock through three separate brokers, falsely representing that he or his mother then owned stock in the corporation. He made various excuses for not delivering the shares on the settlement dates. The Commission suit was announced on April 27 and the price of the stock consequently declined; petitioner was thereafter able to buy the stock with borrowed money, deliver it for settlement "and make a tidy profit" (Pet. 3a).

1. As part of the conspiracy, it was charged that petitioner would obtain confidential inside information about matters under consideration by the Securities and Exchange Commission, including action concerning the Georgia-Pacific Corporation (see Pet. 7). Although the focus at trial was basically on the investigation of the affairs of Georgia-Pacific, there was evidence that petitioner had previously obtained inside information from Weiner about two other corporations (Tr. 337–338). Under the trial court's instructions, the conspiracy charge was limited to the Georgia-Pacific transaction (Pet. 9). Petitioner argues that on appeal, the conviction was affirmed on the differ-

ent theory that there was a broader conspiracy involving information about other corporations as well as Georgia-Pacific. The opinion below does not support this reading. In rejecting the argument that the evidence was insufficient to sustain the conspiracy conviction, the court below simply treated the evidence of earlier dealings between petitioner and Weiner—and properly so—as one factor[1] tending to show that there was an agreement between them relating to the Georgia-Pacific incident (Pet. 5a).

2. In addition to the conspiracy count, petitioner was convicted of three other violations: two counts which charged willful violations of § 10(b) of the Securities Act of 1934, 15 U.S.C. 78j(b) and the Commission's Rule 10b–5 in that petitioner told two brokerage houses to sell Georgia-Pacific Corporation stock, misrepresenting that the sales were long rather than short; and another count which charged a willful violation of § 10(a) of the Securities Act, 15 U.S.C. 78j(a) and the Commission's Rule 10a–1(a) in that petitioner caused shares to be sold short in violation of the rule (Pet. App. 19a–20a). Although admitting that, in order to establish criminal liability,

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[1] These earlier dealings included the fact that in February 1968, Weiner had sexual relations with a girl supplied by petitioner. Petitioner told a government witness that he could sometime obtain the company of prostitutes whom he had defended in his law practice "for his friend in Washington" (Pet. 3a–4a).

There was also evidence of contacts between petitioner and Weiner concerning the stock after Weiner had provided the tip but before the institution of the lawsuit against Georgia-Pacific (see Pet. 16a).

the government was not required to prove that he knew of the rule which had been violated (Pet. 14, 15), petitioner argues that willfully "should be held to require proof of a specific intent to bring about a result which the statute or regulation is designed to prevent" in order to avoid criminal prosecution "for technical or innocuous violations" of the securities laws (Pet. 18).

In concluding that the government had met its burden on the issue of willfulness, the court of appeals held that the standard to be applied was "a realization on the defendant's part that he was doing a wrongful act," that "the act be wrongful under the securities laws and that the knowingly wrongful act involve a significant risk of effecting the violation that has occurred" (Pet. 12a-13a). Once it is admitted—as is the case here—that the government need not prove actual knowledge of the regulation, we fail to perceive any significant difference between the standard suggested by petitioner and that adopted by the court of appeals.

In any event, petitioner received identical concurrent sentences on all counts with no one offense supplying unique or aggravating circumstances likely in itself to have influenced the length of the sentence (one year on each count with all but three months suspended). The evidence introduced to prove the substantive violations would have been admissible at a separate trial on the conspiracy count. Accordingly, this case is appropriate for application of the concurrent sentence doctrine. See *e.g.*, *United States* v.

Bigham, 421 F. 2d 1344, 1346 (C.A. 5), certiorari denied, October 12, 1970, No. 140, this Term; *Braxton v. Maryland*, 395 U.S. 784.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1128

PHILIP PLATZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY MEMORANDUM FOR PETITIONER

I.

The first ground for granting certiorari stated in the Petition (Pet.) is that the Court of Appeals affirmed the conspiracy conviction on the theory that petitioner had been charged with a general conspiracy to obtain information from one Weiner, an SEC employee, although the case was not stated or submitted to the jury on this basis. The government's sole response is that the Petition misreads the opinion below. The government declares that the Court of Appeals

gave the other dealings between petitioner and Weiner only evidentiary effect.' (Gov't Mem. p. 3). The debate need not be extended, for the government's reading is refuted by the Court of Appeals' own words:

> "We see no error in the judge's having allowed the jury to find that Miss Parkhurst's assignation with Weiner in February 1936 was an overt act in pursuance of the general conspiracy charged in the indictment even though it antedated Weiner's first knowledge of the Georgia Pacific investigation. Past favors can constitute consideration for action as much as the promise of future ones." Pet. 5a n. 2.

II.

With regard to the second question presented, the meaning of "willfully" in the "Penalties" section of the Securities Act, the government is unable "to perceive any significant difference between the standard suggested by petitioner and that adopted by the court of appeals." (Gov't Mem., p. 4). We submit that the significance of the difference is established by the very case cited in the Petition, *Screws* v. *United States*, 325 U.S. 91. The prevailing opinion of Mr. Justice Douglas[2] carefully distinguished between two tests for a culpable state of mind: (1) a realization

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[1] Of course, it was proper for the District Court to admit evidence of other dealings as tending to show that there was an agreement between Weiner and petitioner relating to Georgia Pacific, as to which he was charged. That this is not the point which the Court of Appeals made is shown by both its language, quoted herein, and its silence regarding those other incidents. "Pet. 16a" referred to at Gov't Mem. p. 3, n.1, is the *District Court's* opinion denying a new trial.

[2] This opinion not only controlled the result in *Screws* but was followed in *United States* v. *Guest*, 383 U.S. 745, 753-754.

by the defendant that he is doing a wrongful act (which was the standard adopted by the Court of Appeals here), and (2) the defendant's specific intent to bring about a result which the statute is designed to prevent (which we submit is also the correct test to be applied under the Securities Act.)[3]

This distinction was critical in *Screws*, since there could not have been any doubt that the defendants there knew that beating a prisoner to death is a wrongful act, whereas their purpose to deprive the

[3] "We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' Spies v. United States, 317 U.S. 492, 497. At times, as the Court held in United States v. Murdock, 290 U.S. 389, 394, the word denotes an act which is intentional rather than accidental. • • • But 'when used in a criminal statute, it generally means an act done with a bad purpose.' United States v. Murdock, 290 U.S. at page 394. • • • In that event something more is required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U.S. 250. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra, 174 U.S. at page 734; United States v. Murdock, supra, 290 U.S. at page 395. • • •

"An analysis of the cases in which 'willfully' has been held to connote more than an act which is voluntary or intentional would not prove helpful as each turns on its own peculiar facts. Those cases, however, make clear that if we construe 'willfully' in § 20 as connoting a purpose to deprive a person of a specific constitutional right, we would introduce no innovation. The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning." *Screws* v. *United States*, 325 U.S. at 101.

See generally, Extended Note B, "Willfulness", in I Working Papers of the National Commission on Reform of Federal Criminal Laws, 148-151 (GPO, 1970).

prisoners of a "specific constitutional right" (325 U.S. at 101) was a matter of proof. The distinction is also material in this case. For example, while there was evidence that petitioner had a general wrongful intent in asserting ownership of Georgia Pacific securities, there is no evidence whatsoever that he intended either to have a sale executed on a down-tick (which is what Regulation 10-1(a) (Count 5) expressly forbids), or even that he intended to cause a decline in or otherwise to manipulate the market in that stock (which is the broader evil at which the regulation and the underlying statute are directed).

III.

As a fallback position, the government would avert review of the judgment below by resort to the concurrent sentence doctrine:

> "In any event, petitioner received identical concurrent sentences on all counts with no one offense supplying unique or aggravating circumstances likely in itself to have influenced the length of the sentence (one year on each count with all but three months suspended)." (Gov't Mem., p. 4.)[4]

There are three separate reasons why this argument must fail:

1. The mere possibility that this Court would ultimately decide one or the other of the questions presented against petitioner's position is insufficient basis

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[4] The government seems to regard a one-year term of imprisonment "with all but three months suspended" as a minor matter, since it sees fit to mention this point twice in its short memorandum (Gov't Mem., pp. 1, 4). Petitioner, who has no prior criminal record, does not view so lightly either the fact of his conviction, the sentence, or the potential collateral consequences discussed in the text.

for denying review if both questions are independently worthy of this Court's consideration.

2. Petitioner, an attorney, faces disciplinary proceedings if his conviction becomes final. Reversal on one or more counts would almost certainly mitigate the collateral consequences of the conviction. Thus the concurrent sentence doctrine is inapplicable under the holding of *Benton* v. *Maryland*, 395 U.S. 784, 790, as the Courts of Appeals have recognized. See *United States* v. *Spears* (U.S. App. D.C. # 23,043 Feb. 16, 1971), slip op. p. 5 and cases cited, id. n. 8.

3. Finally, the government's surmise that no count by itself influenced the length of the sentence is refuted by the record. We have set forth in full, as an Appendix hereto, Judge Weinfeld's remarks in sentencing petitioner (644-646A). The Court explained that "One of the crimes of which the defendant was convicted involved the corruption of a government employee." p. 7a, *infra*. The Securities Act counts were not mentioned. Where the sentencing judge's conscientious explanation reveals that he attached particular importance to a particular count, review on that count would not be foreclosed by the concurrent sentence doctrine—even if the government ultimately prevails in its view that the burden of proof as to need for review should be on the appealing defendant. See *Benton* v. *Maryland*, 395 U.S. 784, 791-792.[5]

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[5] The government's apparent assumption that this Court has already so decided (Gov't Mem., pp. 4-5) is unfounded. But since the government's assertion may influence the lower courts, and in light of the doubts regarding the present state of the concurrent sentence doctrine which the Court of Appeals candidly expressed (Pet. p. 8a), the possibility that the result on the merits may implicate the concurrent sentence doctrine counsels in favor of, rather than against, the grant of certiorari.

Here it is clear that the conspiracy count was the dominant factor in the sentence imposed. Unless the government's effort to recast the Court of Appeals' opinion succeeds, see pp. 1-2, *supra*, the Court's affirmance on that count was clear constitutional error. Thus, even if the issue of statutory interpretation raised with respect to the Securities Act counts (which the government does not deny inheres in every prosecution under this and related statutes) is deemed unworthy of review, summary reversal on the conspiracy count would be appropriate. See Pet., pp. 11-13.

Respectfully submitted,

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APPENDIX

Excerpt From Transcript of Sentencing Hearing

THE COURT: One should not think it necessary to state so basic a fact but sometimes it does appear necessary to remind others that the Government, and in this instance the public, the citizens, are entitled to the honest services of its employees.

One of the crimes of which this defendant was convicted involved the corruption of a Government employee. The defendant and a co-conspirator and perhaps others cheated the Government of its right to have the honest services of the SEC employees in connection with the particular transaction in question and that may have extended to other transactions as well. The public is entitled to have confidence that all Government employees live up to a proper code of integrity in the discharge of their duties.

This defendant, by training, should have known of the importance of the integrity of governmental services. Yet, as far as this Court is concerned or can ascertain at this point, there is no indication that the defendant has any understanding of the seriousness of the offense. I am making that statement most advisedly. I have gone over as much information as was available and it seems to me that there is no attitude of contrition or understanding of the nature of the offense. On the contrary, the impression that one gathers is that this is a sort of a white collar crime which doesn't carry with it any moral degradation of any kind.

It is true as counsel for the defendant suggested, that in the light of his professional standing and, in some measure, the defendant has wrought his own punishment. Again, I think this isn't the sole answer to the problem of sentencing. There is the interest of the community to be considered.

I have not been unaware, Mr. Todel, of all the factors to which you referred with reference to the defendant's

desire to achieve a certain status in the community. However, it does seem to me this should be on the basis of merit and not on the basis of the means which were used by this defendant.

Under all the circumstances the Court is satisfied that the interest of justice and the best interest of the public, as well as the defendant, will be served by the imposition of a jail sentence under the provisions of Section 3651 of Title 18.

The Court imposes a sentence of one year with a provision that the defendant be confined to a jail-type institution for treatment for a period not to exceed three months and the execution of the remainder of the sentence is suspended and the defendant is placed on probation for a period of one year.